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No. 06-1317

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES EARL SLAUGHTER,
a/k/a JAMES EARL SLAWTER,
a/k/a JEFFREY DEVAN LEONARD

versus ***Petitioner***

THOMAS SIMPSON, WARDEN

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

COUNTERSTATEMENT OF QUESTION PRESENTED

I. **MUST MITIGATION TESTIMONY BE CORROBORATED BY MULTIPLE WITNESSES IN ORDER FOR DEFENSE COUNSEL TO BE EFFECTIVE IN A CAPITAL MURDER TRIAL?**

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) James Earl Slaughter a/ka James Earl Slawter a/k/a Jeffrey Devan Leonard.

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Respondent respectfully opposes the petition for a writ of certiorari.

OPINIONS BELOW

Respondent does not accept Petitioner's account of the opinions below. Petitioner's account is incomplete and the case citations therein are purposely un-captioned.

After the Sixth Circuit affirmed the denial of habeas corpus relief, Petitioner's counsel suddenly started referring to him as "Jeffrey Leonard" in hopes of making a point about the merits of his counsel ineffectiveness claim. The claim is that trial defense counsel was ineffective for not learning Petitioner's "real name."

Heretofore the Petitioner has gone by the name James Slaughter or James Slawter in all of his legal proceedings. Petitioner swore under oath at

trial, in his post-conviction motion, and in his federal habeas petition that his name is James Slaughter.

Petitioner's "opinions below" section omits the captions of any of his prior cases because they all refer to him as James Slaughter. For the same purpose of avoidance, Petitioner's cover page refers only to "Jeffrey Leonard."

Petitioner's death sentence for the 1983 murder of Ester Stewart was affirmed on direct appeal in Slaughter a/k/a Slawter v. Commonwealth, 744 S.W.2d 407 (Ky. 1988). Certiorari was denied in Slaughter v. Kentucky, 490 U.S. 1113 (1989).

The Kentucky Supreme Court affirmed the denial of post-conviction relief by unpublished opinion rendered April 22, 1999. Certiorari was denied in Slaughter v. Kentucky, 528 U.S. 1192

(2000).

The U.S. District Court denied habeas relief in Slaughter v. Parker, 187 F.Supp. 2d 755 (W.D. Ky. 2001). The Sixth Circuit affirmed in Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006). The order denying *en banc* rehearing is reported as Slaughter v.Parker, 467 F.3d 511 (6th Cir. 2006).

JURISDICTION

Respondent accepts the account of jurisdiction appearing in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the account of constitutional and statutory provisions appearing in the appendix to the petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case and its procedural history are adequately summarized in the majority opinion below. Slaughter v. Parker, *supra*, 450 F.3d 224. Additional facts pertinent to the proceeding before this Court are supplied below.

Petitioner testified during the penalty phase of his trial. Petitioner offered the following information in mitigation of punishment:

(1) his legal name was James Earl Slaughter;

(2) he quit school in the seventh grade at age 12;

(3) he obtained his GED at age 17;

(4) his father and mother were separated when he was 3 years old;

(5) his family was transient when he was young;

(6) his father was killed while serving a prison sentence in 1972;

(7) he was abused as a child – for example, his mother would whip him with an extension cord;

(8) he ran away from home at age 12;

(9) his mother died of cancer in 1980;

(10) he had a three year old child living with its mother in Houston, Texas;

(11) he had supported the child in the past;

(12) he had problems with alcohol, amphetamines, hallucinogens, and cannabis; and

(13) he was taking classes at LaGrange Reformatory.

(TE, 1345, 1346, 1347, 1348, 1350, 1351, 1358).

A neutral psychiatrist was appointed pursuant to state law upon Petitioner's written notice of intent

to rely on a mental defense. The psychologist who examined Petitioner was called by the defense to offer mitigation testimony beyond (and corroboration of) that already provided to the capital sentencing jury by Petitioner's own testimony:

(1) although Slaughter is of normal intelligence, he provided "confusing" information regarding his social and family history;

(2) Slaughter refused to identify his place of birth;

(3) Slaughter suffered from alcohol, amphetamine, hallucinogen, and cannabis abuse;

(4) Slaughter suffered from a "border line personality disorder" which causes problems with family and with peers, occupational problems, and academic problems;

(5) Slaughter's disorder could be genetic or hereditary in origin;

(6) Slaughter was a "marginally functioning" individual, unable to establish relationships with peers or friends, unable to hold extended employment, and no lasting relationships with his family;

(7) Slaughter's condition could improve with therapy in a structured environment; and

(8) Slaughter "shielded" his family and support group from the evaluation and trial, and he was not cooperative with testing. (TE 1382, 1383, 1386, 1387, 1389, 1390, 1393, 1397, 1399, 1400, 1403).

The mitigating circumstances were set out in the instructions to the capital sentencing jury. (TR 131).

REASONS WHY CERTIORARI SHOULD BE DENIED

As an initial matter, it should be noted that the preamble to Petitioner's lengthy "question presented" misstates the Sixth Circuit's vote to deny rehearing. Petitioner refers to the vote as "a seven to seven stalemate." (Petition, p. i). However, the order denying rehearing merely says that "less than a majority of the judges having favored the suggestion . . . ." Slaughter v. Parker, *supra*, 467 F.3d at 511. There are multiple ways in which a federal circuit judge can express disagreement with the vote on a petition for rehearing *en banc*. Only the five dissenters expressed disagreement with the vote.

As for the merits of Petitioner's counsel ineffectiveness claim, Petitioner's argument rests on the false premise that mitigation is not adequately

presented unless it is corroborated by multiple witnesses. As shown in the counterstatement of the case in this brief, Petitioner's testimony about mitigation was largely corroborated by that of the psychiatrist called at trial. The additional testimony urged in the petition would have been cumulative at best. State evidentiary law recognizes the phenomenon of diminishing returns: It is neither worthwhile nor always permissible to corroborate what has already been corroborated.

Petitioner also takes issue with the Sixth Circuit's application of Strickland v. Washington, 466 U.S. 668 (1984) in his case. Petitioner bases his complaint on what the Sixth Circuit has said about Strickland in cases other than his own, *e.g.*, Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006, *cert. denied*, 127 S.Ct. 1376 (2007)("to establish

prejudice, the new evidence that a habeas petitioner presents must **differ in a substantial way – in strength and subject matter** – from the evidence actually presented at sentencing") (emphasis added).

It occurs to Respondent that omitted evidence no different in strength and subject matter would be most unlikely to alter the outcome. More to the point, though, in Petitioner's case the Sixth Circuit correctly applied Strickland's "reasonable probability of a different outcome" standard of review.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY D. STUMBO
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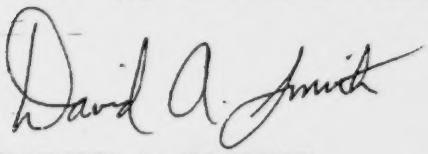

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